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SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 22764-2-III
Court of Appeals No. 23239-5-III

CASHMERE VALLEY BANK, a Washington corporation

Respondent

v.

TERRY B. BRENDER

Petitioner

PETITION FOR REVIEW OF TERRY B. BRENDER

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I. IDENTITY OF PETITIONER

This Petition for review is filed by Terry B. Brender (hereinafter "Mr. Brender"), who was the defendant in the trial court (Chelan County Superior Court).

II. DECISION BELOW

Mr. Brender seeks review of the decision by the Court of Appeals, Division III, Nos. 22764-2-III and 23239-5-III, which decision was filed on July 21, 2005. A motion for reconsideration was filed by Mr. Brender and was denied on August 24, 2005.

III. ISSUES PRESENTED FOR REVIEW

A. Whether all loans intended primarily for consumer purposes must comply with the Federal Truth in Lending Act.

B. Whether summary judgment should be granted where doing so would require the trial court to overturn previously established law in this jurisdiction and adopt the law of another jurisdiction.

IV. STATEMENT OF THE CASE

A. Factual Background.

This appeal arises from an action brought by Cashmere Valley Bank (hereinafter "CVB") against Terry B. Brender (hereinafter "Mr. Brender") seeking judgment for money due on a promissory note, foreclosure of a deed of trust, and to recover personal property. (CP 513-534) Mr. Brender has asserted, among other counterclaims and affirmative defenses, that CVB violated the Federal Truth in Lending Act.

In May 1993, Mr. Brender sought a loan from Jim Geary (hereinafter "Geary"), his personal banker at CVB. (CP 486-488)

The only reason Mr. Brender sought to borrow money from CVB was to settle his divorce, which would require about $150,000. (CP 272-274) Geary knew that this was the only reason Mr. Brender needed the loan, as evidenced by Geary's deposition:

> Q: OK. You made a loan to Mr. Brender in 1993; is that correct?
>
> A: Yes.
>
> Q: OK. Do you recall when you started talking to Mr. Brender about this loan?
>
> A: Not exactly, but I would speculate - - very early in 1993.
>
> Q: OK. And what were the reasons that Mr. Brender came to see you about this loan?
>
> A: He was about to settle a divorce.

(CP 396) CVB likewise knew that this was the only reason that Mr. Brender was seeking the loan, as evidenced by this internal memorandum dated 2/9/93:

> Terry has been a well regarded borrowing customer of the bank for about 30 years. For the past year and a half, he has been in the middle of a complicated and costly divorce proceeding. <u>These new funds being requested would finally settle the divorce</u> and allow him to retain full ownership of his orchard and mill which provide his livelihood.

(CP 65)

Prior to May, 1993, Mr. Brender had taken out an unsecured loan from CVB for about $203,000, which loan was still outstanding. (CP 396-398)

In order to extend Mr. Brender the $150,000 loan to settle his divorce, CVB required that the existing unsecured loan of about $203,000 be consolidated with the approximately $150,000 loan. (CP 61-65) As part of this transaction, CVB required that the entire amount of this consolidated loan be secured by way of collateral consisting of Mr. Brender's home, orchard and mill, thereby improving CVB's position on the $203,000 loan from an unsecured creditor to a secured creditor, as evidenced by the following CVB internal memorandum dated 2/9/93:

> These new funds and the restructuring of our present debt would put the bank in a fully secured and amortizing position.

(CP 65) Such consolidation was in no way initiated by or beneficial to Mr. Brender; his only purpose for securing the loan was to settle his divorce, as Mr. Brender has said in his own words:

> The purpose of the loan was to pay a divorce settlement to my ex-wife. Jim Geary knew the only purpose I needed the loan funds was to pay the divorce settlement to my ex-wife. I had no other reason to obtain a loan from Cashmere Valley Bank. Had I not required loan funds to settle my divorce, I would never have made this loan with Cashmere Valley Bank.

(CP 272-274)

CVB has failed to produce the promissory note signed by Mr. Brender, indicating that it cannot find it. (CP 410-413) Geary made a mistake in amortizing the loan (CP 414), but instead of telling anyone at CVB about the problem (CP 419), Geary attempted to cover up his mistake by creating a new note and forging Mr. Brender's signature on the note, the existence of which note Mr. Brender was not made aware. (CP 231-232 and 511)

In October, 1993, Geary insisted that Mr. Brender sign additional documents, including a new promissory note, which documents dramatically increased his quarterly payments from those required in the original documents and promissory note, and which promissory note Geary later dated back to the original loan date of May 6, 1993. (CP 434-439, 451-452, 462-464, and 512) This new backdated note has been renewed twice, with modified quarterly payments, differing maturity dates, and other modifications to the terms, all without providing Mr. Brender prior notice or federally required disclosure or rescission statements. (CP 505-512) CVB claims that it has no obligation to provide Mr. Brender with any disclosures or rescission statements. (CP 499-504)

B. <u>Procedural Background</u>.

CVB brought an action against Mr. Brender seeking judgment to collect on a promissory note, foreclosure of a deed of trust, and to recover personal property. (CP 513-534) Mr. Brender asserted several counterclaims and affirmative defenses in response to the action brought by CVB, only one of which will be discussed herein: that CVB violated the Federal Truth in Lending Act. (CP 505-512)

Both CVB and Mr. Brender filed motions for summary judgment, and the trial court granted CVB's motion for summary judgment, dismissing all of Mr. Brender's counterclaims and affirmative defenses on summary judgment, including the assertion that CVB violated the Federal Truth in Lending Act – holding that the Federal Truth in Lending Act did not apply to the facts in this case. (CP 18-28) In doing so, the trial court recognized that in Washington, for purposes of determining whether the Federal Truth in Lending Act applies, "the issue of consumer versus commercial transaction is a factual question to be answered only after evaluating the circumstances surrounding the transaction." (CP 244-254)

The trial court recognized that it must construe the evidence in the light most favorable to the non-moving party, but nevertheless determined that it could resolve the admittedly factual question as a matter of law. (CP 244-254)

Mr. Brender appealed to the Court of Appeals, Division III, regarding whether the Federal Truth in Lending Act applies to these facts. The Court of Appeals affirmed the entry of summary judgment dismissing his counterclaims and affirmative defenses, including the assertion that CVB violated the Federal Truth in Lending Act. Cashmere Valley Bank v. Brender, 116 P.3d 421, 423 (Div. III, 2005).

In doing so, the Court of Appeals overturned Washington law, applying Idaho law instead. Id. at 424.

V. ARGUMENT

A. <u>The public has a substantial interest in knowing when lenders must comply with the Federal Truth in Lending Act</u>.

The court should grant review pursuant to RAP 13.4(b)(4) because the public has a substantial interest in knowing when they can and cannot expect to receive easy-to-understand disclosures from lenders required by the Federal Truth in Lending Act.

The purpose of the Federal Truth in Lending Act (hereinafter "TILA") is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. §1601(a). TILA does not apply to transactions "primarily for business, commercial, or agricultural purposes." 15 U.S.C. §1603(1).

So important are the provisions of TILA that a consumer is authorized to bring a private cause of action for noncompliance. 15 U.S.C. §1640(a).

While the distinction between a business transaction and a consumer transaction is clear when the transaction involves only one or the other, the applicability of TILA is totally unclear when the transaction involves both consumer and business purposes, what the Court of Appeals referred to as a “hybrid loan.”

This court has not yet decided where to draw the line with respect to these loans, for purposes of applicability of TILA. There is no clear definition of what constitutes a “hybrid loan” and this case provides a suitable vehicle for defining and drawing such a line and insuring that consumers know when they can expect the protections afforded by TILA.

If the court does not rule on this issue now, significant litigation - similar to the case at bar - will continue to occur.

A number of tests are used in other jurisdictions, primarily the ‘original purpose’ test, the ‘all circumstances’ test, and the ‘quantitative approach’, as evidenced by the non-exhaustive table on the following page:

When to Apply the Federal Truth in Lending Act

Test	Jurisdiction
Original Purpose	• Iowa, Toy Nat. Bank of Sioux City v. McGarr, 286 N.W.2d 376 (1979) • D. North Dakota, Nelson v. Farm Credit Services of North Dakota, 380 F.Supp. 2d 1061 (2005) • Georgia Appellate Court, London v. Bank of the South, 170 Ga.App. 44, 315 S.E. 2d 924 (1984) • S.D. Alabama, Tower v. Home Const. Co of Mobile, Inc., 458 F.Supp. 112 (1978) • N.D. Illinois, Bokros v. Assoc. Finance, Inc., 607 F.Supp. 869 (1984)
All Circumstances	• Louisiana, E.D. Pennsylvania, Gombosi v. Carteret Mortgage Corp., 894 F.Supp. 176 (1995) • 5th Circuit, Tower v. Moss, 30 Fed.R.Serv.2d 598, 625 F.2d 1161 (1980) • Illinois Appellate Court, Westbank v. Maurer, 276 Ill.App.3d 553, 658 N.E. 2d 1381 (1995) (question of fact)
Quantitative	• Idaho, Stillman v. First National Bank of North Idaho, 117 Idaho 642, 791 P.2d 23 (1990) • N.D. Mississippi, Federal Land Bank of Jackson v. Kennedy, 662 F.Supp. 787 (1987) • W.D. Texas, Smith v. Chapman, 436 F.Supp. 58 (1977)

In the case at bar, the Court of Appeals applied the quantitative approach. The outcome of the case would likely have been different if the court had applied the all circumstances test. Moreover, the outcome of the case certainly would have been different if the Court of Appeals had applied the original purpose test.

Mr. Brender's intent in going to CVB to request loan funds was to settle his divorce, a consumer purpose. (CP 272-274) Under the 'original purpose' test, Mr. Brender's purpose would require TILA compliance.

In viewing all the circumstances, one must note that CVB took advantage of Mr. Brender's need for the consumer funds, requiring collateral for the new consolidated loan, which loan improved CVB's position on the previous $203,000 loan from an unsecured creditor to a secured creditor. (CP 65) Such circumstances should trigger the need for TILA compliance.

Banks likewise have an interest in knowing when they must comply with the Federal Truth in Lending Act. Often, funds borrowed from a bank are used for both business and consumer purposes. Banks certainly need to know, when issuing loans, the funds of which are used for more than one purpose, where the line has been drawn for TILA applicability.

B. The Court of Appeals Decision Stands in Direct Conflict with its Previous Decisions and Challenges this Court's Long-Standing Rules Regarding Summary Judgment.

The court should grant review pursuant to RAP 13.4(B)(1) and (2) because the Court of Appeals decision directly conflicts with Conrad v. Smith, 42 Wn.App. 559, 712 P.2d 866 (Div. III, 1986), and conflicts with this court's ruling in Wilson v. Steinbach, 98 Wn.2d 434, 656 P.2d 1030 (1982).

In Conrad, Division III of the Court of Appeals stated that, in determining whether TILA applies:

> Whether a loan is for personal or business purposes appears to be a factual question to be answered only after evaluating the circumstances surrounding the transaction.

Conrad, 42 Wn.App. 559, 563, 712 P.2d 866, citing Thorns v. Sundance Properties, 726 F.2d 1417, 1419 (9th Cir. 1984); Tower v. Moss, 625 F.2d 1161, 1166-67 (5th Cir. 1980).

In the case at bar, the Court of Appeals did not evaluate the circumstances surrounding the transaction; rather, the court applied a quantitative approach (if more than 50% of the loan funds are used for business purposes, then the loan is a business loan), adopting Idaho law found in Stillman v. First National Bank of North Idaho, 117 Idaho 642, 791 P.2d 23 (Idaho, 1990). Cashmere

Valley Bank v. Brender, 116 P.3d 421, 424-26. Such holding is in direct conflict with Conrad, warranting review by this court.

Further, it is a well established and fundamental principal of summary judgment that:

> The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the non-moving party.

Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030, citing Barrie v. Hosts of America, Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980).

Summary judgment should only be granted where:

> There is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

CR 56(C). Inherent in this rule is the notion that where a party moves for summary judgment in a Washington State court, summary judgment will only be granted if the party is entitled to judgment as a matter of Washington law. Summary judgment should not be granted to a party in a Washington court where the party is not entitled to a judgment as a matter of Washington law, but perhaps is entitled to a judgment as a matter of the law of some other jurisdiction.

In granting CVB's motion for summary judgment, the trial court recognized that the determination of TILA applicability is a question of fact, but ruled on its applicability as a matter of law. (CR 244-254).

While the trial court examined the circumstances surrounding the transaction as required by Conrad, it absolutely failed to do so in the light most favorable to Mr. Brender, as required by Wilson v. Steinbach. If the trial court had viewed the facts and inferences therefrom in the light most favorable to Mr. Brender, it would have inferred, for purposes of summary judgment, that: (1) the agreed-upon purpose for the loan was to settle Mr. Brender's divorce, and (2) that CVB took advantage of Mr. Brender's need for such consumer funds to improve its position on the $203,000 loan from an unsecured creditor to a secured creditor, by requiring that the $203,000 loan be consolidated with the new $150,000 loan.

In affirming the trial court's granting of CVB's summary judgment, the Court of Appeals applied Idaho law: the 'quantitative approach.' Cashmere Valley Bank v. Brender, 116 P.3d 421, 426. Thus, the Court of Appeals held, in effect, that summary judgment should be granted where the moving party is entitled to judgment as a matter of the law of some other jurisdiction. The Court of Appeals basically said that the trial court applied the wrong test for determining whether TILA applies, but affirmed summary judgment because CVB was entitled to it as a matter of Idaho law.

This case provides a suitable vehicle for this court to reign in a Court of Appeals, which allows trial courts to grant summary judgment without reviewing the facts and inferences therefrom in the light most favorable to the non-moving party. It is also a suitable vehicle for this court to establish a uniform rule requiring that summary judgment only be granted if the moving party is entitled to judgment as a matter of Washington law, rather than as a matter of the law of some other jurisdiction.

VI. CONCLUSION

This court should grant review in order to serve the public's interest in knowing when lenders need to comply with the Federal Truth in Lending Act. The court can protect such public interest by establishing a uniform rule defining what loans constitute hybrid loans and indicating when these loans must comply with the Federal Truth in Lending Act.

This court should also grant review because the Court of Appeal's decision conflicts with its previous decisions regarding the applicability of the Federal Truth in Lending Act and undermines fundamental principles regarding summary judgment.

CVB's summary judgment should not have been granted or affirmed. The facts and inferences therefrom should have been construed in the light most favorable to Mr. Brender, and Idaho law should not have been applied in order to affirm summary judgment.

RESPECTFULLY SUBMITTED this 21st day of September, 2005.

JEFFERS, DANIELSON, SONN & AYLWARD

By ______________________________
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APPENDIX

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APPENDIX "A-1"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CASHMERE VALLEY BANK, a Washington corporation,	**No. 22764-2-III**
	No. 23239-5-III
Respondent,	
v.	**Division Three**
	Panel Six
TERRY B. BRENDER, a single man,	**PUBLISHED OPINION**
Petitioner.	

KURTZ, J. – Cashmere Valley Bank (CVB) filed an action against Terry B. Brender to collect on a promissory note and recover the collateral pledged to secure the loan. In response, Mr. Brender alleged several counterclaims and affirmative defenses, including: (1) violation of the federal truth in lending act (TLA); (2) violations of the Washington State Consumer Protection Act; (3) fraud or misrepresentation; (4) breach of the covenant of good faith and fair dealing; and (5) breach of contract. Both parties filed motions for summary judgment. Mr. Brender appeals the trial court's dismissal of his counterclaims and affirmative defenses. We affirm the decisions of the trial court.

FACTS

CVB filed an action against Terry B. Brender to collect on a promissory note dated November 30, 2001, and to recover the collateral pledged to secure the loan (2001 Loan). This loan was a renewal of loans made in 1993 and 1996.

1993 Loan. The first loan was made in 1993 (1993 Loan) for the amount of $358,095.70. Mr. Brender obtained this loan with the assistance of his personal banker, Jim Geary. At the time of the 1993 Loan, Mr. Brender was in default on pre-1993 loans, and CVB had initiated an action to collect on the unsecured debts.

To obtain the 1993 Loan, and settle CVB's lawsuit, Mr. Brender was required to pledge his orchard, shake mill, and mobile home, free and clear of his wife's interests. The couple was in the process of getting a divorce, and Ms. Brender owned a one-half interest in these properties. Ms. Brender agreed to release her interests for approximately $150,000. As a result, $200,000 of the $358,095.70 loan was used by Mr. Brender to pay off the preexisting business loans. But Mr. Brender used the remaining $150,000 to buy out Ms. Brender's interests in the orchard, shake mill, and mobile home. Mr. Brender then pledged these properties as collateral for the 1993 Loan.

As part of the 1993 Loan, Mr. Brender signed a Disbursement Request and Authorization representing and warranting to CVB that this loan was primarily for business purposes.

There is a dispute over the terms of the initial 1993 Loan. Mr. Brender contends the initial terms of the 1993 Loan were for him to pay the $358,095.70 principal at 8.5 percent interest over a 15-year period, with quarterly payments of $7,500. Apparently, no one was able to produce a copy of this promissory note. However, Mr. Geary admits that he discovered an amortization problem and that the 1993 Loan was revised.

In any event, ultimately the terms of the 1993 Loan were revised in October 1993, when Mr. Brender signed a second promissory note increasing the amount of quarterly payments to $10,694.44, so that the principal would be correctly amortized and would not result in a negative amortization. Under the terms of the loan, a balloon payment was due in June 1996.

After executing the revised note, Mr. Brender made advance payments on the Revised 1993 Loan and when the 1993 Loan matured in June 1996, Mr. Brender had paid to CVB approximately $45,000 more than he was obligated to pay under the Revised 1993 Loan.

1996 Renewal. In June 1996, the 1993 Loan matured and the unpaid balloon payment was due. Mr. Brender then signed a note (1996 Loan) that renewed the 1993 Loan. Mr. Brender admits signing the 1996 Loan. At the time the 1996 Loan was executed, Mr. Brender also signed a Disbursement Request and Authorization.

1999 Loan. In 1999, Mr. Brender borrowed additional funds from CVB. Mr. Brender provided a financial statement showing the amount due on the 1996 Loan. This statement indicated that Mr. Brender believed that $225,000 was due on the 1996 Loan and that the quarterly payments were approximately $7,950.

2001 Loan. In 2001, Mr. Brender signed a note to refinance the 1999 Loan and the 1996 Loan into one loan.

Issues Resolved on Summary Judgment. In response to CVB's action, Mr. Brender alleged several counterclaims and affirmative defenses, including: (1) violation of the TLA; (2) violations of the Washington State Consumer Protection Act; (3) fraud or misrepresentation; (4) breach of the covenant of good faith and fair dealing; and (5) breach of contract. The parties each filed motions for summary judgment.

On appeal, Mr. Brender contends the trial court erred by: (1) concluding the TLA did not apply to the loans between CVB and Mr. Brender; (2) dismissing Mr. Brender's remaining counterclaims and affirmative defenses based on the statute of limitations and the doctrine of account stated; and (3) concluding that Mr. Brender failed to provide any basis for his claims alleging fraud, misrepresentation, breach of contract, or breach of the covenant of good faith and fair dealing.

ANALYSIS

Standard of Review. When reviewing an order granting summary judgment, this court engages in the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the nonmoving party. Kahn v. Salerno, 90 Wn. App. 110, 117, 951 P.2d 321 (1998).

Federal Truth in Lending Act. Mr. Brender maintains that the TLA applies because his loan was incurred primarily for a personal purpose. In contrast, CVB contends the TLA does not apply because the loan proceeds were used for business purposes. The court agreed with CVB, dismissing Mr. Brender's claim under the TLA.

The TLA was designed to promote the informed use of credit by requiring lenders to make meaningful disclosure of the credit terms in a manner easily understood by borrowers. See 15 U.S.C.A. § 1601; Conrad v. Smith, 42 Wn. App. 559, 562, 712 P.2d 866 (1986). The TLA applies only to consumer transactions. 15 U.S.C.A. § 1603(1). The TLA may be enforced by various federal agencies, but the TLA also establishes a cause of action by a consumer against a creditor who fails to make the proper disclosures. 15 U.S.C.A § 1640(a). A private cause of action alleging a violation of the TLA may be brought in federal or state court. 15 U.S.C.A. § 1640(e).

The loan in question here is a hybrid loan because it was made for both consumer and business purposes. See Fed. Land Bank v. Kennedy, 662 F. Supp. 787 (N.D. Miss.

1987). As a result, the determination regarding whether the TLA applies must be based on an inquiry into whether the loan is primarily a commercial loan or primarily a consumer loan. Courts have used several methods when conducting this inquiry.

Quantitative Approach. Some courts have applied a mathematical inquiry to determine whether the TLA applies. These courts make this determination based on whether a majority of the loan proceeds were used for commercial purposes or consumer purposes. See Bokros v. Assocs. Fin., Inc., 607 F. Supp. 869 (N.D. Ill. 1984); Stillman v. First Nat'l Bank, 117 Idaho 642, 791 P.2d 23 (1990).

In Stillman, the court concluded, as a matter of law, that a loan was exempt from the application of the TLA where the debtor had borrowed $32,000 and used $16,411 for business purposes and $15,559 for personal purposes. Stillman, 117 Idaho at 25. In reaching this conclusion, the court applied a strictly quantitative approach and determined that more than one-half of the proceeds were used for a purpose that was exempt under the TLA. Id.

Mr. Brender contends that Stillman involved a single loan and is inapplicable here. He points out that the only reason he was borrowing money from CVB was to settle his divorce; he was not borrowing money for two purposes, one exempt and one nonexempt.

But this argument is unpersuasive; the undisputed facts demonstrate that prior to the 1993 Loan, Mr. Brender was in default on unsecured business debts owed to CVB.

To receive the 1993 Loan, Mr. Brender had to pledge his orchard, shake mill, and mobile home. Mr. Brender was involved in a divorce and Ms. Brender owned a one-half interest in these properties. Mr. Brender used approximately $200,000 of the 1993 Loan to pay off the pre-1993 business loans, and approximately $150,000 of the 1993 Loan to buy out Ms. Brender's interests. Mr. Brender was then able to use these properties to secure the loan.

Applying the quantitative analysis to the facts here, more than one-half of the proceeds of the 1993 Loan were used for business purposes and the 1993 Loan was exempt from the TLA. Accordingly, under the analysis adopted in Stillman, the 1993 Loan would be exempt from the application of the TLA. Because all of the subsequent loans were simply renewals of the 1993 Loan, these loans also would be exempt under this analysis.

Original Purpose. Another approach used to determine the character of a hybrid loan examines the original character of the loan and the predominating purpose of the loan. See Toy Nat'l Bank v. McGarr, 286 N.W.2d 376 (Iowa 1979).

In Toy, a consumer loan of $1,016.83, was refinanced and consolidated with a business loan of $12,035.26, and the resulting loan of $13,077.09 was secured by a second mortgage on the debtor's home. Id. at 377. The borrower's wife rescinded the loan, arguing that this was her first involvement with the loan and that her intent was to assist her husband with his financial problems and avoid foreclosure of their home. She maintained that the loan was for personal purposes and that the TLA applied. Toy held that the use of the proceeds of the original loan should be used to characterize the loan throughout the life of the loan. Id. at 378.

All Circumstances. In Conrad, the court considered a transaction that was not a hybrid loan. The borrower obtained a loan to refinance a prior commercial loan with additional funds necessary to pay off liens on the borrower's house, which was to be used as security for the refinanced loan. The loan statement and the promissory note contained a statement that the loan was made for commercial purposes, but the proceeds of the loan were used to discharge all encumbrances against the house, except the first mortgage. When the borrowers defaulted on the loan, the lenders initiated foreclosure proceedings and the borrowers initiated an action alleging a violation of the TLA. Conrad, 42 Wn. App. at 561-62.

In Conrad, the court determined that Toy and Anderson v. Lester, 382 So.2d 1019 (La. Ct. App. 1980), were the most directly on point. Conrad, 42 Wn. App. at 565. In Anderson, the loan in question was determined to be a consumer loan because the borrowers entered into the transaction to prevent the seizure of their residence and to pay off those debts that constituted the most immediate threat to the residence. Moreover, the lender testified that he was aware of this concern and the purpose of the loan. Anderson, 382 So.2d at 1023.

Significantly, Conrad did not completely adopt Toy's holding that the original purpose of the loan controls throughout the life of the loan. But the court concluded that the facts in Conrad resulted in the same result. Conrad, 42 Wn. App. at 566. In Conrad, the court approved an expanded inquiry, concluding that the determination regarding whether a loan is for personal or business purposes is a question of fact requiring consideration of all of the circumstances surrounding the transaction. Id. at 563. Nevertheless, the court also concluded that the facts were sufficiently established to resolve the issue as a matter of law.

Mr. Brender relies heavily on Conrad. He urges this court to adopt a broader inquiry and consider all of the circumstances when examining the character of the loan in question. To advance his position, he relies on a statement in Conrad that: "Here, the record is devoid of evidence the [lenders] were aware the loan was for any purpose other than 'business.'" Id. at 566. Based on this statement, Mr. Brender maintains that the evidence demonstrated that CVB was aware of the purpose of his 1993 Loan. However, as the trial court correctly noted here, Conrad did not involve a hybrid loan because the loan was obtained to refinance a prior commercial loan with additional funds to clear liens.

We adopt the Stillman quantitative approach to determining whether a hybrid loan is made for consumer or business purposes. The quantitative approach is the easiest to apply and it will promote certainty in the commercial marketplace. Conversely, a test for hybrid loans that examines all relevant circumstances will promote uncertainty and litigation. As already noted, the majority of the loan proceeds here were used for commercial purposes and, consequently, the loan is exempt from the application of the TLA for a business loan.

We conclude the court did not err by granting CVB's motion for summary judgment and dismissing Mr. Brender's TLA claims, including his affirmative defenses.

Doctrine of Account Stated. The court concluded that the doctrine of account stated applied to bar claims made related to the 1993 and 1996 Loans. The doctrine of account stated results from a manifestation by both the creditor and the debtor that the stated sum is an accurate computation of the amount due. Sunnyside Valley Irrigation Dist. v. Roza Irrigation Dist., 124 Wn.2d 312, 315, 877 P.2d 1283 (1994) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 282(1) (1981)). Evidence of assent in some form is required, but assent is determined by examining all of the circumstances and acts of the parties. Id. at 316 (quoting Shaw v. Lobe, 58 Wash. 219, 221, 108 P. 450 (1910)). As a result, assent may be implied. Id. More importantly, payment, absent an object manifestation of protest or an intent to negotiate the disputed sum in the future, is sufficient to establish an account stated. Sunnyside Valley, 124 Wn.2d at 316 n.1.

The undisputed evidence here is sufficient to establish an account stated with regard to the 1993 Loan and the 1996 Loan. CVB provided Mr. Brender with quarterly statements related to both loans and Mr. Brender paid these amounts—and apparently made no agreement to renegotiation of these sums in the future. Along similar lines, Mr. Brender executed at least two promissory notes and three disbursement requests setting forth the amounts he owned to CVB and the terms of payment.

Mr. Brender contends that Rustlewood Association v. Mason County, 96 Wn. App. 788, 789-800, 981 P.2d 7 (1999), supports his position that the doctrine of account stated is inapplicable here. In Rustlewood, residents of a development sought to enjoin the county from imposing a utility surcharge to recover past expenditures exceeding the monthly fees previously paid by the residents. Concluding that the account stated doctrine did not apply, the court distinguished Sunnyside, based on the fact that the billing of monthly fees was not analogous to an open account because there was no need for complex accounting procedures and the rate was set by statutory procedure. Id. at 799. The court also noted that the parties did not dispute the fixed monthly amount. Id. at 799-800.

While the trial court here concluded that the doctrine of account stated applies to preclude Mr. Brender from challenging the debt owed on the 1993 and the 1996 Loans, the court refused to apply this doctrine to claims related to the 2001 Loan.

CVB argues that the court erred in its conclusion because Mr. Brender learned of the account balance and informed a bank official that he intended to pay this debt. Moreover, CVB points out that Mr. Brender received statements and had conversations with Mr. Geary about the account balance. In contrast, Mr. Brender contends that his account balance was incorrect, that he never received the loan printout that he requested, and that the payments on the loan were not the same from month to month.

Based on the evidence presented by Mr. Brender, we cannot conclude that the account stated doctrine applies to the 2001 Loan. While the parties agree that Mr. Brender incurred a debt, the parties do not agree on the amount owed.

Statute of Limitations. In light of the trial court's decision to dismiss his claims regarding the 1993 Loan and the 1996 Loan based on the doctrine of account stated, Mr. Brender contends that the discovery rule applies to toll the statute of limitations on these claims.

The discovery rule applies to toll the applicable statute of limitations when an aggrieved party, through the exercise of due diligence, could have discovered that a claim existed. Hudson v. Condon, 101 Wn. App. 866, 875, 6 P.3d 615 (2000). The claimant need not be aware of the full extent of the damages, but knowledge of some actual appreciable damage is sufficient to commence the statute. Id.

Mr. Brender's claims are based on allegations of improper conduct by CVB dating back to 1993. For example, Mr. Brender alleges that he had a closed door meeting with Mr. Geary during which Mr. Geary cornered him and insisted that he sign the revised note. This meeting should have put Mr. Brender on notice of a possible claim against CVB. Moreover, Mr. Brender received statements showing the amount of quarterly payments due pursuant to the revised note. In June 1996, Mr. Brender paid off the 1993 Loan by refinancing the debt into the 1996 Renewal. Mr. Brender also signed a new promissory note and a disbursement request and authorization stating the amount refinanced. After the 1996 Loan was executed, Mr. Brender received quarterly statements from CVB.

Based on this evidence, the trial court correctly determined that the discovery rule did not apply to toll the statute of limitations as to Mr. Brender's claims regarding the 1993 Loan and the 1996 Loan.

Mr. Brender also argues that the statute of limitations does not run with regard to his affirmative defenses. Mr. Brender points out that statute of limitations periods do not run against defenses arising out of the transaction sued upon. See Allis-Chalmers Corp. v. City of North Bonneville, 113 Wn.2d 108, 112, 775 P.2d 953 (1989).

However, Mr. Brender's claims under the TLA and the Consumer Protection Act cannot be advanced as affirmative defenses as to any of the loans. Similarly, his remaining claims cannot be advanced as affirmative defenses with regard to the 1993 Loan and the 1996 Loan as the trial court properly granted summary judgment on these claims based on the application of the doctrine of account stated.

While the statute of limitations bars actions and affirmative defenses related to the 1993 and 1996 Loans, the claims regarding the 2001 Loan are not precluded. Mr. Brender raised concerns related to this loan in his answer which was filed only 16 months after the 2001 Loan transaction occurred.

Remaining Claims. In the first of three memorandum opinions, the trial court granted summary judgment dismissing Mr. Brender's claim under the Consumer Protection Act, chapter 19.86 RCW, as to the 1993 Loan, the 1996 Loan, and the 2001 Loan. The court also dismissed Mr. Brender's claims involving the 1993 Loan and the 1996 Loan. These claims alleged fraud, misrepresentation, breach of contract, and breach of the covenant of good faith and fair dealing. The court reasoned that summary judgment had been entered on these claims based on the doctrine of account stated and the statute of limitations. As a result, we look to the 2001 Loan in order to determine whether the court erred by dismissing the same claims as to that loan.

Consumer Protection Claim. To prevail on a private claim under the Consumer Protection Act, the claimant must establish: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) having a public interest impact; (4) which results in injury to the claimant or his or her business; and (5) causation. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

Assuming that Mr. Brender has presented sufficient evidence to defeat a motion for summary judgment on all of the other factors, Mr. Brender cannot demonstrate sufficient evidence to establish an effect on public interest. Factors examined when considering an effect on public interest include whether: (1) the defendant committed the acts in the course of his business; (2) the defendant advertised to the general public; (3) the defendant actively solicited this particular plaintiff; and (4) the plaintiff and the defendant had unequal bargaining positions. Id. at 790-91.

Although Mr. Brender alleges various acts by CVB, there is no evidence indicating that CVB advertised these loans to the public or that this was anything more than a breach of contract claim between private parties. Mr. Brender argues that he had a longstanding relationship with a loan officer at CVB and that all of the alleged wrongful acts took place behind closed doors. In short, there is no evidence suggesting that these allegations are likely to occur with other members of the public.

Fraud, Misrepresentation, Breach of Contract, and Covenant of Fair Dealing. The trial court dismissed Mr. Brender's claims for fraud, misrepresentation, breach of contract, and breach of the covenant of good faith and fair dealing. In this appeal, Mr. Brender does not marshal authorities and argument showing that the court erred by dismissing these claims. For that reason, we will not address these issues on appeal, which are deemed abandoned. Seattle-First Nat'l Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 243, 588 P.2d 1308 (1978).

In summary, we affirm the decisions of the trial court.

Kurtz, J.

WE CONCUR:

Sweeney, A.C.J.

Schultheis, J.

APPENDIX "A-2"

FILED

AUG 24 2005

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

CASHMERE VALLEY BANK, a Washington corporation,	)	**No. 22764-2-III**
	)	**No. 23239-5-III**
Respondent,	)	
v.	)	**ORDER DENYING MOTION FOR RECONSIDERATION**
TERRY B. BRENDER, a single man,	)	
Petitioner.	)	

The court has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of July 21, 2005, is hereby denied.

DATED: August 24, 2005

FOR THE COURT:

Kenneth H. Kato

KENNETH H. KATO
CHIEF JUDGE